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All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?

I. INTRODUCTION

At no time has what the Third Circuit picturesquely calls the "cloak and dagger" conception of conspiracy obtained in the antitrust field. "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age" —an age long preceding 1890.¹

Yet the law of conspiracy cannot be entirely severed from its origins, any more than can the law of antitrust. With the enactment of the Sherman Anti-Trust Act² in 1890, a young industrial society sought to remedy its economic evils, drawing in part on the ancient law of conspiracy.³ The dynamic nature of the economic setting in which the Sherman Anti-Trust Act is to be enforced has sometimes seemed at odds with the legal formalism of the conspiracy concept, creating thorny problems for judges and litigants who still must struggle with the long shadows cast by those "pointed hats."

The Sherman Anti-Trust Act in §§ 1 and 3⁴ bars conspiratorial or multi-party conduct in restraint of trade, but does not prohibit

1. Handler, *Contract, Combination or Conspiracy*, 3 A.B.A. ANTITRUST SECTION 38, 41 (1953).

2. Act of July 2, 1890, ch. 647, §§ 1-8, 26 Stat. 209, as amended 15 U.S.C. §§ 1-7 (1970).

3. The Sherman Anti-Trust Act § 1, 15 U.S.C. § 1 (1970), states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

The Sherman Anti-Trust Act § 2, 15 U.S.C. § 2 (1970), states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty

The Sherman Anti-Trust Act § 3, 15 U.S.C. § 3 (1970), states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

4. Discussion here will focus upon § 1 because of its more common applicability, but generally what is said regarding that section applies to § 3 as well.

restraints of trade created by single entities. Section 2, on the other hand, reaches monopolistic conduct per se, whether engaged in by a single entity or a combination.⁵ This difference in the sections has been the source of much scholarly analysis and speculation, but all agree that the statutory language is a monument in vagueness.⁶ Because certain conduct appears to fall between these sections, somewhere beyond the reach of either, the understandable temptation for prosecutors has been to seek a modified application of conspiracy concepts.⁷ One such modification is the intra-enterprise conspiracy doctrine.

Variously termed "thin conspiracy,"⁸ "intra-corporate conspiracy,"⁹ "bathtub conspiracy"¹⁰ and other characterizations,¹¹ the intra-enterprise conspiracy doctrine in all its manifestations involves a finding of illegal conspiracy within a single business enterprise,¹² as between subsidiary corporations of the same parent or between a subsidiary and its parent. Although the term "intra-corporate" is commonly used interchangeably with "intra-enterprise," its use here is restricted to its more natural meaning, i.e., that branch of the intra-enterprise doctrine dealing with activity within a single corporation. "Intra-enterprise conspiracy" will be used herein to refer to conspiracies involving more than one corporation within a single business enterprise.

5. The Sherman Anti-Trust Act §§ 1-3, 15 U.S.C. §§ 1-3 (1970).

6. See, e.g., Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section One of the Sherman Act?*, 11 FED. B.J. 130, 134 (1951) [hereinafter cited as Kramer]; Krause, *The Multi-Corporate International Business Under Section One of the Sherman Act—Intra-Enterprise Conspiracy Revisited*, 17 BUS. LAWYER 912, 914 (1962) [hereinafter cited as Krause]; Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950).

7. Another reason often suggested for the attempt to stretch traditional conspiracy concepts is that of prosecutorial convenience. A lighter burden of proof or longer period of limitations may provoke resort to § 1, which requires a conspiracy, rather than § 2, which does not, even though the challenged conduct may clearly be within the prohibition of the latter section. See, e.g., 63 YALE L.J. 372, 373-74 (1954).

8. E.g., *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974).

9. E.g., Wilberding, *An Ominous Warning for Antitrust Law: The Disposition of the "Bathtub" Conspiracy—As Applied to Unincorporated Divisions—May Have Left a Tell-Tale Ring Around the Tub*, 32 OHIO ST. L.J. 43, 45 (1971) [hereinafter cited as Wilberding].

10. *Id.*

11. E.g., 43 NOTRE DAME LAWYER 786 (1968).

12. Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158 (1962) [hereinafter cited as Barndt].

The intra-corporate branch of the doctrine has been widely discredited, although the Supreme Court has never settled the issue of its existence.¹³ The broader intra-enterprise doctrine is alive and flourishing, with the blessing of the Supreme Court,¹⁴ yet its wisdom is hotly contested and its scope unclear. This "intra-enterprise" branch of the doctrine will be the focus of this study.

Exhaustive examinations of the intra-enterprise conspiracy doctrine have appeared in the legal periodicals over the past twenty-five years; thus, it is not the aim of this comment to focus once more on the doctrine's evolution or its propriety. After a very brief overview of the conflicting rationales of the proponents and opponents of the doctrine, a cross-section of cases will be reviewed to determine whether there is a tendency to cluster around possible "exceptions" or limitations to the doctrine. As the area is in a state of flux, no ultimate answers will be offered—only suggestions as to the patterns which appear to exist.

II. CONSPIRACY WITHIN A SINGLE BUSINESS ENTERPRISE: AN IDEA WHOSE TIME HAS COME — OR HERESY?

To the proponents of the intra-enterprise conspiracy doctrine, it represents enlightenment. Most who favor the intra-enterprise branch of the doctrine would carry it still further into the intra-corporate sphere.¹⁵ They note, first, that the Sherman Anti-Trust Act nowhere mandates that the corporation be the conspiring unit.¹⁶ The Act simply requires a conspiracy (for § 1 violations) and since corporate agents and officers are independent legal entities, these individuals may conspire among themselves on the corporation's behalf to restrain trade.¹⁷ On the intra-enterprise scale, the corporate agents who may conspire (at least under this rationale) are incorporated subsidiaries, rather than individuals.¹⁸

13. See, e.g., *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n.9 (9th Cir. 1969).

14. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

15. See, e.g., *Barndt*, *supra* note 12.

16. *Id.*

17. "Legal units do not coincide with economic units and the single-trader may conspire with itself." Note, *The Sherman Act and Multi-Corporate Single-Traders: Competition Among Affiliates?* 100 U. PA. L. REV. 1006, 1011-12 (1952).

18. In one case, unincorporated divisions were found capable of conspiracy by the district court, but the Ninth Circuit reversed. The lower court had looked beyond the fact that the

It has been argued as a matter of statutory construction, that the word "conspiracy" in § 1 must be read as in § 2, that is, the substantive offense was intended to be made unlawful in both.¹⁹ This argument concludes that in any event the vagueness of the statutory language was surely designed by Congress to permit judicial adaptation to changes in economic reality. A failure to extend the conspiracy concept to cooperative conduct within a single corporation or multicorporate enterprise would provide a "loophole," inviting such enterprises to engage freely in anticompetitive conduct.²⁰

Those who favor the doctrine reject the argument that it irrationally and unfairly discriminates against corporations that do business through incorporated subsidiaries rather than unincorporated divisions, which serve the same functions but which cannot conspire.²¹ The reply is that: (1) perhaps the doctrine should be extended to encompass divisions, and (2) simply because some businesses enjoy a loophole does not require that others be permitted the benefit of the same loophole.²² The proponents also rebuff the argument that the per se aspect of § 1²³ will cause normal daily decision-making between parent and subsidiary to be condemned as unlawful. They reply that the per se rule may be relaxed in intra-enterprise cases in favor of the "rule of reason."²⁴ The approach ultimately proposed by the doctrine's adherents is to ask first if an unreasonable restraint of trade has occurred. If the answer is affirm-

divisions were not legal entities, in order to get at their practical autonomy in daily operations. *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

19. *Kramer*, *supra* note 6, at 134-35. If this analysis is correct, most problems in finding a conspiracy that fits traditional definitions can obviously be bypassed, since the "restraint of trade" is itself a crime, even if engaged in by a single entity.

20. *Id.* at 141.

21. *See* note 18 *supra*.

22. *Barndt*, *supra* note 12, at 187.

23. The Sherman Anti-Trust Act normally applies only to *unreasonable* restraints of trade. However, certain activities (e.g., price-fixing, group boycotts and market division) are so abusive that they are considered unreasonable restraints of trade per se, regardless of the actual degree of impact on commerce.

24. E.g., Comment, *Corporate Liability for Intra-Corporate Conspiracy in Restraint of Trade*, 1968 U. ILL. L.F. 248, [hereinafter cited as *Corporate Liability*]:

It seems improbable, however, that the concept of *per se* violations would be applied indiscriminately in the intra-enterprise or intra-corporate context. Since the inception of the Sherman Act, the courts have consistently recognized that only *unreasonable* restraints of trade constitute a violation. . . . Such limitations in the application of the *per se* rules have been recognized by scholars . . .

Id. at 253 (footnote omitted).

ative, § 1 can in most cases be stretched to reach the situation.²⁵

To those who oppose the intra-enterprise conspiracy doctrine, it represents pure heresy to established legal thought. Moreover, it is an instrument of uncertain range, creating persistent feelings of paranoia in counsel who must advise corporate management of the legal status of their company's dealings through its subsidiaries. The rationale of the opponents is premised on the fact that § 1, unlike § 2, requires the action of more than one party.²⁶ The opponents argue that where a single business enterprise does business through incorporated subsidiaries, these separate corporations are, in economic fact, functioning as one enterprise in most cases. The subsidiaries, although distinct legal entities, are in actuality only "agents" or instrumentalities of a single business.²⁷ It is emphasized that Congress obviously was concerned about cooperative or conspiratorial conduct between separate *business units*²⁸ and that in circumventing the requirement for such multi-party conduct, the courts have subverted the legislative directive, effectively reading the conspiracy requirement out of the statute.²⁹

The opponents further argue that the uncertainty which the doctrine has created regarding the legality of routine corporate decision-making is intolerable in a criminal statute.³⁰ This same

25. *E.g.*, Barndt, *supra* note 12, at 198.

One writer summarized in this manner:

The true single-trader defense is not concerned with conspiracy at all. It is grounded in the proposition that, absent monopoly, restraints within the confines of a single enterprise, *i.e.*, internal price and distribution policies, have no harmful effects on competition. And it would seem to make little difference whether the business were [*sic*] conducted in single- or multi-corporate form, as long as a common management controlled throughout. *The crucial question is whether trade of third parties is restrained. This depends on the effect of defendants' conduct on suppliers, customers, and competitors.*

63 YALE L.J. 372, 388 (1954) (emphasis added).

26. *See* note 3 *supra*.

27. *See, e.g.*, Kempf, *Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?*

24 BUS. LAWYER 173 (1968) [hereinafter cited as Kempf].

28. Sprunk, *Intra-Enterprise Conspiracy*, 9 A.B.A. ANTITRUST SECTION 20, 25 (1956).

29. *Id.* at 21 (footnote omitted):

The theory that parent can conspire with subsidiary, or that illegal concert of action can be found within the confines of a single corporation, places in jeopardy the vast majority of all American business. . . . Serious concern has been expressed that once the law ignores the obvious fact that parent and subsidiary constitute but a single economic entity, then no form of business organization, except the sole proprietorship with no employees, can escape the possible thrust of the theory.

30. *Id.* at 22.

uncertainty has also led to a very real fear that the doctrine may be arbitrarily invoked by prosecutors as a method of harrassment, or by private plaintiffs with an ax to grind or simply made greedy by the sweet scent of treble damages.³¹

The opponents of the doctrine are particularly nettled by the proponents' battle-cry: "substance, not form,"³² when, in fact, in the case of intra-enterprise conspiracy, it is form which has been exalted in order to reach within a single business technically, and only technically, composed of more than one corporation. At the same time, a business operated through unincorporated divisions is left untouched.³³ As many legitimate business reasons exist for choosing a subsidiary rather than divisional structure, no sound reason for the discrimination is apparent.³⁴

At the root of many of the fears which the doctrine has engendered is the per se concept that exists under § 1. Normally, Sherman Anti-Trust Act violations are found only in *unreasonable* restraints of trade.³⁵ However, certain activities have been found so abusive as

31. *Corporate Liability*, *supra* note 24, at 254-55.

32. *See, e.g.,* *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947). The "substance, not form" rationale of the intra-enterprise conspiracy proponents is as follows: The antitrust laws are concerned with substance, not form. Since businesses have chosen to accept the benefits of multi-corporate operation, they must bear the burden of exposure to antitrust liability. They cannot hide behind the argument that there can be no conspiracy without a plurality of actors, since this argument is based on a mere formal technicality.

33. *See, e.g.,* *Kempf*, *supra* note 27, at 177; *Krause*, *supra* note 6, at 929.

An oft-quoted paraphrase of the "substance versus form" rationale of *United States v. General Motors Corp.*, 121 F.2d 376, 404 (7th Cir. 1941), is as follows:

The court's reasoning was stated in three sentences:

"Nor can the appellants enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader. The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce. But even if the single trader doctrine were applicable, it would not help the appellants."

One might read this as: "Form matters. Form does not *really* matter. Even if form did really matter, you're stuck anyhow."

McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 190-91 (1955) (footnote omitted) [hereinafter cited as McQuade].

34. *See, e.g.,* *Krause*, *supra* note 6, at 912; *McQuade*, *supra* note 33, at 186. Tax reasons are undoubtedly a primary reason for selection of a subsidiary structure. Others frequently cited include increased managerial flexibility, maintenance of the good will associated with an acquired business, and promotion of employee morale by creation of more executive positions. Still others will be suggested by a perusal of the above-cited articles.

35. *Sunderland, Changing Legal Concepts in the Antitrust Field*, 3 SYRACUSE L. REV. 60, 61 (1951).

to be considered inherently unreasonable, without regard to their actual impact on commerce.³⁶ The idea that a pricing arrangement adopted by a parent and subsidiary may be held illegal per se has understandably caused some consternation.³⁷

Opponents of the doctrine are fond of pointing to its widespread unenforcement as evidence of its shortcomings. The doctrine's proponents prefer to view this under-enforcement as evidence that common sense will be utilized by the courts to apply the doctrine only where appropriate. All agree that a "conspiracy" within a single enterprise cannot be blindly subjected to the same set of standards as a conspiracy between independent competitors.³⁸

In view of this universally-felt need to establish some limits on the intra-enterprise conspiracy doctrine, but widely diverging opinion as to where these limits should be imposed, lower courts have necessarily engaged in an ad hoc balancing of the considerations involved. The following review of cases is premised on the belief that no court will treat all affiliates as independents, nor every agreement between them as a conspiracy. Some courts, convinced of the soundness of the intra-enterprise conspiracy doctrine, will apply it in most cases but find "exceptions" in compelling circumstances. Others, less fond of the doctrine, will apply it only when first convinced that the particular facts fit within tightly defined limits. Accordingly, some of the limitations discussed below are phrased as "exceptions," carved from the generally-applicable rule, while others are discussed as limitations serving to confine the rule itself to a very narrow range of cases.

III. UNDER WHAT CIRCUMSTANCES WILL THE DOCTRINE BE APPLIED?

A. *The Competitor Limitation*

Of the possible limitations on the intra-enterprise conspiracy doc-

36. *Id.* at 63-66.

37. McQuade, *supra* note 33, at 215:

To some extent, at least, the intra-enterprise theory probably evolved from a groping attempt to solve the problem created by the existence of these areas between the loose and the tight organization. To have sensed the problem is good. To have tried to solve it with Section 1 is not. Section 1 was not designed for the job. Its per se characteristic is antithetical to the type of judgments required in these mid-areas. There must be some opportunity to show economic justification.

38. Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20, 21 (1968) [hereinafter cited as Willis & Pitofsky]; Carlston, *Basic Anti-trust Concepts*, 53 MICH. L. REV. 1033, 1044 (1955).

trine, the competitor limitation rule has much articulate and broad-based support. The single most comprehensive discussion of this limitation and most influential, if judicial citation is any indicator,³⁹ is a 1968 article by Willis and Pitofsky.⁴⁰ Briefly stated, this rule would limit application of the intra-enterprise conspiracy doctrine to cases wherein affiliated corporations have publicly adopted a competitive posture.⁴¹

The leading case is *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,⁴² which involved the per se offense of price-fixing.⁴³ A liquor wholesaler brought a private treble damage action against Seagram and Calvert distilleries and their sales organizations, alleging that defendants had conspired to sell only to those wholesalers who would sell at or below maximum prices set by defendants. Defendants contended that they as "mere instrumentalities of a single manufacturing-merchandizing unit"⁴⁴ were incapable of conspiring.⁴⁵ In rejecting this contention, the Supreme Court stated that common ownership did not remove the impact of the antitrust laws and noted: "The rule is especially applicable where, as here, respondents hold themselves out as competitors."⁴⁶

As Willis and Pitofsky note, the Court's language leaves several questions unanswered, such as the nature of the harm done, since apparently no one was actually misled into believing that Seagram and Calvert were truly independent competitors.⁴⁷ Those authors

39. *E.g.*, Beckman v. Walter Kidde Co., 316 F. Supp. 1321, 1326 (E.D.N.Y. 1970), *aff'd*, 451 F.2d 593 (2d Cir. 1971)(*per curiam*), *cert. denied*, 408 U.S. 922 (1972).

40. Willis & Pitofsky, *supra* note 38.

41. Where the affiliates have never adopted a competitive stance, the intra-enterprise conspiracy doctrine would only be applied in such comparatively rare instances as abuse of the parent-subsidary structure.

42. 340 U.S. 211 (1951).

43. Another noteworthy aspect of the case was its declaration that fixing maximum, as well as minimum, prices violates the Sherman Anti-Trust Act. *Id.* at 213.

44. 340 U.S. at 215.

45. The defendants were related as follows:

	Distillers Corp
	Seagram & Sons, Indiana
Seagram, Sales	Calvert
	Calvert, Sales

Each company was an incorporated subsidiary of the company directly above it on the diagram.

46. 340 U.S. at 215.

47. Willis & Pitofsky, *supra* note 38, at 37, 38. Those authors suggest that the case is in line with certain Federal Trade Commission precedent: *FTC v. A. A. Berry Seed Co.*, 2 F.T.C.

conclude that a competitor limitation is reasonable, since the misleading "holding out" of a competitive posture may indeed contribute to anticompetitive results, while numerous legitimate business goals could be served if affiliations between apparent competitors were disclosed.⁴⁸

Other commentators have agreed with Willis and Pitofsky in their reading of *Kiefer-Stewart*. In fact, one well-respected scholar in the field viewed the case as of limited significance since he believed it held only that affiliates may conspire when they present themselves as independent competitors.⁴⁹ Still others have noted that other Supreme Court decisions, *Sunkist Growers, Inc. v. Winckler & Smith Co.*⁵⁰ and *Timken Roller Bearing Co. v. United States*,⁵¹ may be read consistently with such a limitation.

Sunkist involved agricultural cooperatives formed by groups of citrus growers. The Court declined to find the parent, Sunkist, capable of conspiring with its wholly-owned subsidiaries, Exchange Lemon and Exchange Orange, in violation of the Sherman Anti-Trust Act, §§ 1 and 2. Although the Court placed great emphasis on the exemption from antitrust liability granted agricultural cooperatives pursuant to § 6 of the Clayton Act and § 1 of the Capper-Volstead Act those statutory provisions did not necessarily dictate the result,⁵² nor is the Court's holding so restricted. The Court stated:

427 (1920); *FTC v. Armour & Co.*, 1 F.T.C. 430 (1919); *FTC v. Fleischmann Co.*, 1 F.T.C. 119 (1918); and at least one district court case of old vintage, under the Sherman Anti-Trust Act: *United States v. American Can Co.*, 230 F. 859 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921).

48. Willis & Pitofsky, *supra* note 38, at 38.

49. McQuade, *supra* note 33, at 207. Other commentators agreeing with the possibility of a limited reading of *Kiefer-Stewart* include Krause, *supra* note 6, at 926; and Wilberding, *supra* note 9, at 51.

50. 370 U.S. 19 (1962), *cited by* Gold, *Hawaiian Oke: Kiefer-Stewart Revisited?*, 24 U. MIAMI L. REV. 681, 692-93 (1970) [hereinafter cited as Gold].

51. 341 U.S. 593 (1951), *cited in* 63 YALE L.J. 372, 379 (1954).

52. Section 6 of the Clayton Act, 15 U.S.C. § 17 (1970) reads in pertinent part:

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291 (1970) reads in pertinent part:

[W]e feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. *There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations.*⁵³

The *Timken* decision regarded market division by affiliates. Division of markets is a per se offense, and the application of the intra-enterprise conspiracy doctrine in this setting drew a sharp dissent from Justice Jackson.⁵⁴ The named appellant, Timken, was accused of conspiring with British Timken and French Timken, its subsidiaries, to divide world markets for roller bearings. The agreements to divide markets had originated between appellant and British Timken's predecessor before 1910, while the companies were unrelated competitors. These agreements persisted through 1927 when appellant and an English businessman seeking investment opportunities purchased all of British Timken's outstanding stock. The following year, appellant organized French Timken, and made further territorial assignments with it. Since these affiliates had always behaved as competitors, and two had originally been independent

Persons engaged in the production of agricultural products . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes

The Supreme Court discussed the above-quoted exemptions in *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960). In response to the Association's claim that these sections were meant to wholly exempt cooperatives from the antitrust laws, the Court stated that "[i]n the early 1900's, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws." *Id.* at 464. The court also stated that this result was the only end sought to be avoided by these sections. *Id.* at 465. It should be noted that a similar provision exists with regard to incorporated subsidiaries, *i.e.*, Clayton Act § 7, 15 U.S.C. § 18 (1970).

53. 370 U.S. at 29 (emphasis added).

54. 341 U.S. at 606.

competitors in fact, it has been suggested that the Court probably intended its holding to reach only those situations where the affiliates held themselves out as competitors—and perhaps, only where they had once competed in fact.⁵⁵

Since *Kiefer-Stewart*, another Supreme Court decision has been rendered which has given rise to further debate on a possible competitor limitation. *Perma-Life Mufflers, Inc. v. International Parts Corp.*,⁵⁶ held that a parent, International Parts, could conspire with its subsidiary, Midas, and other subsidiaries to violate § 1. In *Perma-Life Mufflers*, numerous § 1 violations were alleged by the plaintiff, a Midas Muffler Shop dealer, including resale price-fixing and requiring dealers to purchase all exhaust system parts from Midas. The case has been cited, without elaboration, in support of a competitor limitation.⁵⁷ Yet the case is not clearly supportive of the limitation, since there was a factual dispute as to whether or not International Parts and its subsidiaries were either competitors or apparent competitors. It has been suggested, by respectable authority, that the opinion is susceptible of such interpretation but only, of course, if the Court had resolved the factual controversy *sub silentio* by finding competition.⁵⁸

There are a number of lower court cases that address the question of whether a competitive stance is required in order to find a conspiracy between affiliates. In two cases, the question was not squarely before the court, but it was suggested that the issue would be a proper one for consideration on an adequate record.⁵⁹

The earliest case denying that a competitive posture should be

55. 63 YALE L.J. 372, 381 (1954).

56. 392 U.S. 134 (1968).

57. Gold, *supra* note 50, at 692.

58. Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 CALIF. L. REV. 182, 183-85 (1969).

59. *TV Signal Co. v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1260 (8th Cir. 1972); *American TCP Corp. v. Shell Oil Co.*, 127 F. Supp. 208, 210 (S.D.N.Y. 1955). In the latter case, which arose on motions to strike allegations, the court, in denying the motion, noted that a competitive posture might be relevant. In the former case, the Eighth Circuit reversed the lower court dismissal of plaintiff's action for treble damages, stating that the existence of a competitor limitation was a "substantial question," which required actual facts, rather than the bare pleadings, for determination. It noted that the Seventh Circuit had rejected such a limitation in *Tamaron Distrib. Corp. v. Weiner*, 418 F.2d 137 (7th Cir. 1969), and in *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941). The latter case will be discussed below, but it should be noted that the former case, although analogous, is not strictly on point, as it involved a manufacturer and its noncompeting agent.

required for the imposition of liability for conspiracy between affiliates is *United States v. General Motors Corp.*⁶⁰ General Motors and its noncompeting subsidiary, General Motors Acceptance Corporation (GMAC) were charged with forcing General Motors dealers to finance through GMAC. The court of appeals rejected General Motor's argument that "a combination of competing units is essential to conspiracy under the Sherman Act." The court stated, "Clearly a vertical combination or combination of non-competitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act."⁶¹ It must be remembered, however, that this case pre-dates *Kiefer-Stewart*, so its precedential value can not be considered an ultimatum on this point.

A more recent case rejecting a competitor requirement is *Battle v. Liberty National Life Insurance Co.*⁶² In *Liberty National* an action was brought by a funeral director against an insurer which had issued burial policies and its wholly-owned subsidiary which supplied merchandise and services required by the policies. The subsidiary contracted with funeral homes, making them "authorized" suppliers under the policies. An insured using an authorized home was entitled to much more under the policy than one going to an unauthorized home. The court stated that although competition between the defendants would tend to establish that they were independent parties, lack of competition would not render them incapable of conspiring to their mutual benefit.⁶³ This case appears to unequivocally reject a competitor requirement, yet it is somewhat confusing in its failure to cite or discuss *Hudson Sales Corp. v. Waldrip*,⁶⁴ an earlier Fifth Circuit opinion which was apparently contrary. *Liberty National* also raises eyebrows by relying on *Beckman v. Walter Kidde & Co.*,⁶⁵ a Second Circuit case which is strong authority for a contrary result. One can only speculate as to the ultimate impact of *Liberty National* in light of these considera-

60. 121 F.2d 376 (7th Cir. 1941).

Another early case, *Ozdoba v. Verney Brunswick Mills, Inc.*, 152 F. Supp. 136, 138 (S.D.N.Y. 1946), held more broadly that "non-competitors or members of an affiliated group may conspire."

61. 121 F.2d at 404.

62. 493 F.2d 39 (5th Cir. 1974).

63. *Id.* at 44, citing *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970).

64. 211 F.2d 268 (5th Cir. 1954).

65. 316 F. Supp. 1321 (E.D.N.Y. 1970).

tions, but it is suggested here that it may fit within an alternative limitation, *e.g.*, use of the subsidiary relationship specifically to achieve an anti-competitive result.

Of the cases which support a competitor requirement, *Hudson Sales Corp. v. Waldrip*⁶⁶ is among the oldest. Plaintiff, a Hudson automobile dealer, alleged that defendant Hudson Motor Car had conspired with its wholly-owned subsidiary, Hudson Sales, to force plaintiff to deal only in Hudson products. The court hesitated to find the defendants, who did not compete, capable of conspiring. It analogized the parent-noncompeting subsidiary relationship to the corporation-individual agent relationship in which it had earlier held a conspiracy impossible.⁶⁷ As noted above, the present status of this case is questionable in light of *Liberty National*.

The Ninth Circuit apparently has endorsed the competitor limitation in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.*⁶⁸ In addition to recognizing the competitor requirement, the opinion is otherwise noteworthy for overturning the district court finding that unincorporated divisions are capable of Sherman Anti-Trust Act conspiracy; thus the competitor aspect has frequently been ignored. The case arose as a treble damage action by a wholesale liquor distributor against several related distilleries for termination of its distributor contract. The claim under § 1 was group boycott, a *per se* violation.

In determining whether the defendant affiliates could conspire, the lower court had concentrated on the degree of autonomy of each. One factor considered was competition. The district court, however, applied its autonomy test not only to the separate corporate defendants, but to their divisions as well. Thus the "substance, not form" rationale justified finding conspiracy between business branches that were not even legal entities.⁶⁹

The lower court had charged the jury with regard to two of the defendants, Barton and its subsidiary, Barton-Western, that since the two did not compete, they were to be viewed as one entity.⁷⁰

66. 211 F.2d 268 (5th Cir. 1954).

67. 211 F.2d at 273, *citing* *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952).

68. 416 F.2d 71, 81-82 (9th Cir. 1969).

69. *Hawaiian Oke & Liquors Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967).

70. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71, 80 (9th Cir. 1969).

Although the court of appeals rejected the idea of an *intra-corporate* conspiracy, it approved that part of the district court's opinion which would require competition as a measure of sufficient autonomy for a conspiracy between *incorporated* affiliates.⁷¹ The court stated:

Surely a manufacturer and its . . . distributor, whether a subsidiary or an independent, can agree to transfer their business from one wholesaler to another without running afoul of the group boycott *per se* rule, in the absence of some forbidden anti-competitive or monopolistic objective.⁷²

It should be noted that this language is broad enough to have an impact outside the intra-enterprise conspiracy area.

Although the case was decided in the context of a *per se* violation, and may be intended to only apply in such instances, the authorities cited are more universal.⁷³ Since the *per se* violations are the most extreme examples of the problems with intra-enterprise conspiracy, however, and offer the clearest opportunity for abuse, a reading of the case which limits it to its facts would offer some alleviation.

Probably the most thorough judicial discussion of the competitor requirement appears in *Beckman v. Walter Kidde & Co.*⁷⁴ Plaintiff there had entered an agreement with a subsidiary of Kidde for the distribution of the subsidiary's products. At the same time it entered an oral understanding with the subsidiary that it could handle Kidde products, as well. Both Kidde and its subsidiary later refused to deal with plaintiff, who alleged a *per se* group boycott under § 1. The district court granted summary judgment in defendant's favor, since the only conspiracy alleged was between Kidde and its wholly-owned subsidiary. The court refused to extend the intra-enterprise conspiracy doctrine, distinguishing *Kiefer-Stewart* "on the crucial ground that the conspiracy in that case was between two competing subsidiary companies."⁷⁵ The court concluded its discussion by quoting with approval the Willis and Pitofsky article, stating that its decision was prompted by the need to limit the intra-enterprise conspiracy principle.⁷⁶

71. *Id.*

72. *Id.* at 81-82.

73. *E.g.*, Willis & Pitofsky, *supra* note 38.

74. 316 F. Supp. 1321 (E.D.N.Y. 1970).

75. 316 F. Supp. at 1325.

76. *Id.* at 1326.

A final case in support of the competitor limitation of the intra-enterprise conspiracy doctrine is *Ark Dental Supply Co. v. Cavitron Corp.*⁷⁷ This case arose as an appeal from summary judgment in defendants' favor. The Third Circuit affirmed per curiam on several unrelated grounds, but stated in a footnote that "ample authority"⁷⁸ existed for holding that no § 1 violation was possible, since one of the defendants, Clev-Dent, was a division of Cavitron and the other defendants, Coles (a Cavitron subsidiary) and Cavitron, had never held themselves out as competitors.⁷⁹ Obviously, this footnote is only an aside on Third Circuit thinking, since the question was not squarely before it; still the language is there and strongly indicates approval of the competitor limitation.

As the cases discussed here suggest, the trend in the lower federal courts has been to embrace the competitor limitation where the question has arisen.⁸⁰ It is urged that this result comports with the legislative scheme of reserving § 1 liability for cases where independent competitors have combined to restrain trade, except for narrow and compelling circumstances.⁸¹

B. Abuse of the Subsidiary Structure

This limitation of intra-enterprise conspiracy is premised on the fact that many legitimate business reasons exist for adopting a subsidiary method of doing business which the antitrust laws were never intended to thwart.⁸² However, where the subsidiary structure is selected specifically for achieving an anti-competitive result, no

77. 461 F.2d 1093 (3d Cir. 1972).

78. The court, at 461 F.2d at 1094-95 n.1, cited *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969); *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970); and the "competitor" language of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951).

79. 461 F.2d at 1094.

80. Apparently contrary is *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974). Frequently, the applicability of such a limitation is not raised or discussed. *E.g.*, *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602, 606 (E.D. La. 1958). In other cases, a similar argument has been made successfully which is not tied to a generally-applicable competitor limitation, but to a consideration of the sum-total of the facts. *E.g.*, *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F. Supp. 868 (S.D.N.Y. 1973).

81. See, *e.g.*, *McQuade*, *supra* note 33, at 184-85, discussing the legislative allocation of burdens and benefits in the antitrust laws.

82. See authorities cited at note 34, *supra*. See also *Willis & Pitofsky*, *supra* note 38, at 26-28.

good reason exists for insulating the components from liability for that behavior. Accordingly, ability to conspire would be found between affiliates whose very affiliation was motivated by a desire to restrain trade. The leading exponents of this narrow application of the intra-enterprise conspiracy doctrine are Willis and Pitofsky.⁸³

In support of their thesis, Willis and Pitofsky discuss the Supreme Court opinion of *United States v. Yellow Cab Co.*⁸⁴ In that case, it was alleged that defendants had conspired to monopolize the sale of cars to principal cab companies in Chicago, Pittsburgh, Minneapolis and New York, and the furnishing of cab services in Chicago.⁸⁵ Parmalee, the parent-defendant, had acquired or organized subsidiaries holding 100% of cab licenses in Pittsburgh, 58% in Minneapolis, 15% in New York and 53% in Chicago.⁸⁶ The Court found that an unreasonable restraint on commerce

may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed.⁸⁷

In discussing the theory of the complaint, the Court stated:

The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint . . . is that "dominating power" over the cab operating companies "was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control."⁸⁸

Willis and Pitofsky point out that such a limitation on the intra-

83. Willis & Pitofsky, *supra* note 38, at 38.

84. 332 U.S. 218 (1947) as cited in Willis & Pitofsky, *supra* note 38, at 39.

85. 332 U.S. at 220.

86. *Id.* at 221.

87. *Id.* at 227.

88. *Id.* at 227-28, quoting *United States v. Reading Co.*, 253 U.S. 26, 57 (1920). As Willis and Pitofsky indicate, the existence of other, broader language interspersed with the above-quoted language makes the limitation debatable, but the Court removed all doubt by narrowly construing the *Yellow Cab* holding in *United States v. Columbia Steel Co.*, 334 U.S. 495, 520-22 (1948). See Willis & Pitofsky, *supra* note 38, at 40.

enterprise conspiracy doctrine is in keeping with the settled anti-trust principle that an otherwise lawful business practice may be prohibited if undertaken for improper motives, but note that such conduct would probably be reachable under § 2 in any event.⁸⁹ Yet, the fact that § 2 may generally be available to reach the same violations covered by this limitation does not negate the very real possibility that the additional availability of § 1 may be desirable from the prosecutor's viewpoint for strategical and procedural reasons.⁹⁰

Another author advanced a similar thesis as a possible rationale for the district court opinion in the *Hawaiian Oke* case.⁹¹ There the *Kiefer-Stewart* defendants had changed from subsidiary to divisional structure to avoid the force of the Supreme Court decision. The author's thesis was that this would constitute an impermissible motive. Although the much-discussed opinion was ultimately reversed by the Ninth Circuit,⁹² thus settling for the time-being the question of the validity of Seagram's motives, the other cases cited by the student commentator for the broader principle that *some* motives may invalidate otherwise lawful conduct remain noteworthy.

Highland Supply Corp. v. Reynolds Metal Co.,⁹³ the first case cited by the commentator, is a somewhat confusing opinion due to its repeated references to an acquisition as a "merger" and to the supposed *inability* of affiliates to conspire as "Intra-Enterprise Conspiracy." However, the holding clearly is that liability will be imposed "because the alleged conspiracy took place before the [acquisition] and the [acquisition] did not stop the conspiracy."⁹⁴

89. Willis & Pitofsky, *supra* note 38, at 41.

90. See, e.g., 63 YALE L.J. 372, 373-74 (1954).

91. 36 FORDHAM L. REV. 607, 611 (1968), discussing *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967).

The district court noted that the defendants were fundamentally the same parties that the Supreme Court had held capable of conspiring in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1955). Since that decision, the corporate structure at Seagram had changed from incorporated subsidiaries to unincorporated divisions, apparently in an effort to avoid similar antitrust difficulties in the future. The court noted that the divisions operated in virtually the same manner as the subsidiaries had, and that the structural change had been purely formal.

92. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 81-82 (9th Cir. 1969).

93. 238 F. Supp. 561 (E.D. Mo. 1965).

94. *Id.* at 564.

The second case cited by the author is *Beacon Fruit & Produce Co. v. H. Harris & Co.*,⁹⁵ involving a true intra-corporate, as opposed to intra-enterprise, conspiracy. The only alleged conspirators were the corporation, its directors and officers. In denying defendants' motion for summary judgment, the court relied on plaintiffs' charge that the individual defendants in fact "conspired to form the defendant corporation as a mere instrumentality" in order "to take over the partnership business as a step in securing control of the market and imposing a restraint of trade for their individual benefit."⁹⁶

A more recent case illustrative of the proposition that bad motives for establishing subsidiaries may expose the enterprise to intra-enterprise conspiracy charges is *Credit Bureau Reports, Inc. v. Retail Credit Co.*,⁹⁷ a private treble-damage action brought by a corporation engaged in non-local credit reporting. The named defendant Retail Credit Co. (RCC) was characterized as "a dominant force in the market of insurance credit reporting."⁹⁸ The allegations charged, *inter alia*, that RCC had a monopoly in insurance credit reporting and was utilizing that dominance as a tool to secure a monopoly of credit reporting generally and to drive plaintiff out of business.⁹⁹ It was alleged that RCC had acquired 100 credit bureaus in a five-year period, and had launched a new subsidiary "purely for predatory purposes."¹⁰⁰ Injunctive relief was sought, as well as divestiture of all bureaus acquired within the preceding four years.

The court declined to find a price-fixing violation for lack of evidence of a "corrupt agreement" or of any agreement between RCC and its subsidiaries in this regard. It recognized, however, that under Supreme Court decisions, such an agreement was possible between affiliates.¹⁰¹ Thus, the court refused to find a per se § 1 violation due to lack of evidence of a conspiracy, a strange result in light of *Kiefer-Stewart*,¹⁰² where the evidence of an agreement between the defendants was hardly more convincing. This result may signify uneasiness with per se charges in this area.

It is clear that the court did find a § 2 violation in RCC's ac-

95. 152 F. Supp. 702 (D. Mass. 1957).

96. *Id.* at 704.

97. 358 F. Supp. 780 (S.D. Tex. 1971).

98. *Id.* at 785.

99. *Id.* at 786.

100. *Id.*

101. *Id.* at 787.

102. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

tions,¹⁰³ and probably a § 2 violation by intra-enterprise conspiracy, since many of the wrongful acquisitions were made by RCC subsidiaries, rather than directly by RCC. Whether the acquisitions were also found to constitute a § 1 violation is not really clear from the opinion. Section 1, of course, was unnecessary to reach the alleged conduct here, in light of the holding under § 2. The finding that RCC used the subsidiary structure to achieve an anticompetitive result is clear. The court noted that RCC and its subsidiaries had acquired more than 100 credit bureaus within a very brief period. It found the conclusion "inescapable" that these very acquisitions had been motivated by a desire to eliminate competition.¹⁰⁴ The court granted the injunctive relief sought by the plaintiff, but declined to order divestiture for policy reasons.¹⁰⁵

Application of the intra-enterprise conspiracy doctrine in the narrow situations where the motivation behind the affiliation itself was restraint of trade is a sensible restriction on the doctrine.¹⁰⁶ In such cases, the relative ease of proving a "conspiracy," due to the affiliation, is less likely to constitute a prosecutorial abuse than in the normal, legitimately-conceived parent-subsidiary structure.

C. *Internal Decision Limitation*

This "exception" really exists in more than one version, depending upon its proponent's feelings toward intra-enterprise conspiracy. All versions start with the premise that "purely" internal policy-making cannot be viewed as a conspiracy to unreasonably restrain trade. Beyond this premise, however, the limitation is perhaps too loosely defined to even constitute a "test." It more closely resembles a review of the total factual setting to determine whether enough indicia are present to label internal discussions "conspiracy." There is, of course, no exact cut-off point at which a court must apply a

103. 358 F. Supp. at 791, stating: "The evidence clearly leads to the conclusion that RCC is a monopolist, that it has deliberately traveled a course which will enable it to maintain that monopoly, and, consequently, has run afoul of Section 2 of the Sherman Act in that regard."

104. *Id.* at 787.

105. *Id.* at 797.

106. This restricted application also comports with very early Supreme Court cases in this area, such as *United States v. Northern Sec. Co.*, 120 F. 721 (C.C. Minn. 1903), *aff'd*, 193 U.S. 197 (1904). There, Great Northern and Northern Pacific, theretofore competing railroads, had been acquired by the defendant, Northern Securities. See discussion of this and other early cases by Kramer, *supra* note 6, at 137.

conspiracy label. How many factors must be present—and which factors are relevant—depends upon the predilections of the judge.

The major factor to be considered is the *type* of decision entered into by affiliated corporations. "Normal" internal decisions, such as termination of distributor agreements,¹⁰⁷ pricing,¹⁰⁸ or advertising policy of newspapers,¹⁰⁹ under this view should be presumptively proper matters for unified action by the multi-corporate enterprise and accordingly beyond the prohibition of the Sherman Anti-Trust Act. Those who oppose the intra-enterprise conspiracy doctrine would probably stop here, and state that the principle of per se violations should certainly never apply to internal decisions. Some opponents of the intra-enterprise conspiracy doctrine would go still further, and require a showing of (a) appreciable impact outside the corporate family (*i.e.*, an "unreasonable" restraint of trade) and/or (b) specific intent to create such a restraint, before applying the intra-enterprise conspiracy doctrine.¹¹⁰ Others would not apply the doctrine even if both factors were present, but persist in calling this an internal, nonconspiratorial decision unless the affiliates were held out as competitors or their very affiliation was motivated by a desire to restrain trade.¹¹¹

The proponents of the intra-enterprise conspiracy doctrine, on the other hand, would look to the external impact created by the internal decision. If there has been an impact on outsiders, the proponents would apply the intra-enterprise conspiracy doctrine. Thus external impact becomes the triggering mechanism for applying the doctrine. This result is justified, not because the affiliates have stopped functioning as a unified enterprise in internal decision-making, but because at the point that harm to outsiders results, it becomes unimportant whether the old technicality of a plurality of actors is satisfied. Since all internal decisions have *some* impact outside the corporation, the opponents of the "external impact" test see it as virtually no test at all—so vague and capable of arbitrary

107. *E.g.*, *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323 (8th Cir. 1973); *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir. 1954).

108. *E.g.*, *United States v. Arkansas Fuel Oil Corp.*, 1960 Trade Cas. ¶ 69,619, at 76,493 (N.D. Okla.).

109. *E.g.*, *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972).

110. *See, e.g.*, *Alpha Distrib. Co. v. Jack Daniel's Distillery*, 207 F. Supp. 136 (N.D. Cal. 1961).

111. *Willis & Pitofsky, supra* note 38, at 48-49.

stretching as to provide no notice to those who must comply with it.¹¹²

A representative case is *Alpha Distributing Co. v. Jack Daniel's Distillery*.¹¹³ This was a private action brought by a former Jack Daniel's distributor, who sought an injunction to prohibit the manufacturer and its corporate affiliate from marketing its whiskey through others. Plaintiff argued that the termination of its exclusive distributorship constituted a group boycott per se. The court, while acknowledging the availability of the intra-enterprise conspiracy doctrine, rejected the claim, stating:

[I]t is doubtful that mere concert of such affiliates for the purpose of exercising their right, as a single business unit to fix the price of the product or select a chosen distributor, and nothing more, constitutes a per se anti-trust violation.¹¹⁴

The court concluded that in such a situation, there should be a showing that either (a) the affiliates were not merely acting as a unified business or (b) that any impact created by their actions was actually unreasonable.¹¹⁵

Another case containing an especially thorough discussion of this "impact" test is *In re Penn Central Securities Litigation*.¹¹⁶ There minority shareholders of Great Southwest Corporation (GSC) sued Pennco, a wholly-owned subsidiary of Penn Central Railroad, for alleged Securities Exchange, Sherman Anti-Trust, and Clayton Act violations. The alleged § 1 violation was that Pennco had conspired with its subsidiaries (including GSC, the vast majority of whose voting stock was held by Pennco) to divide markets, a per se violation.¹¹⁷ The court in dismissing for failure to state a cause of action noted that this was "not the normal intra-enterprise conspiracy

112. Any cooperation or coordination between components of a multi-corporate enterprise can adversely affect the trade of outsiders if those outsiders happen to be suppliers, customers, or competitors of the corporate unit. For example, simple price coordination between corporate components could adversely affect purchasers who must pay a higher or lower price depending on the intra-enterprise decision or competitors of the components who must meet or be undercut by a lower price depending upon that decision.

Id. at 49.

113. 207 F. Supp. 136 (N.D. Cal. 1961).

114. *Id.* at 137-38.

115. *Id.* at 138.

116. 367 F. Supp. 1158 (E.D. Pa. 1973).

117. *Id.* at 1165.

problem," involving actions directed against strangers to the corporate family.¹¹⁸ The court held that internal management decisions by a parent regarding only the conduct of its subsidiaries' businesses was not within the purview of § 1.¹¹⁹ It also rejected the argument that injury to the minority shareholders of a subsidiary was an actionable external impact.¹²⁰

The "internal decision" limitation, in its most basic form, is here endorsed as a means of dealing with one of the greatest shortcomings of the intra-enterprise conspiracy doctrine—the danger that per se liability will be invoked by the disgruntled in order to convert a routine internal decision into an antitrust violation. Termination of a distributorship, as in the *Alpha Distributing* case, or other refusals to deal are especially vulnerable to this type of abuse. The temptation to secure through antitrust litigation a measure of revenge, not to mention treble damages, is understandable. This same susceptibility to abuse inheres in the "external impact" formulation of this limitation (*i.e.*, treating impact on outsiders as a triggering mechanism to invoke the doctrine). For this reason, the external impact version of the internal decision limitation is not believed to offer sufficient protection against improper application to merit its adoption.

A recent case from the District of Columbia has further delineated the scope of the internal decision limitation. *Chastain v. American Telephone & Telegraph Co.*¹²¹ was a private action brought by fifteen unaffiliated individuals and businesses engaged in distribution of a mobile telephone unit. Plaintiffs charged defendant American Telephone & Telegraph Co. (AT&T) and its operating subsidiaries (the Bell System) of engaging in a group boycott of plaintiffs' product. The court briefly reviewed the evolution of the intra-enterprise conspiracy doctrine, noting that courts had rarely found such a conspiracy, and even then, only where a full record of the facts "either expressly or by necessary implication" established "that the corporations had acted without a legitimate business purpose and with anticompetitive intent."¹²² This review of the doctrine's application convinced the court that a factual record would be required

118. *Id.* at 1166.

119. *Id.* at 1167.

120. *Id.* at 1167 n.4.

121. 5 TRADE REG. REP. (1975 Trade Cas.) ¶ 60,519, at 67,294 (D.D.C. Oct. 1, 1975).

122. *Id.* at 67,300.

in order to determine whether a conspiracy had occurred. Specifically, a finding of conspiracy would depend upon whether the Bell System had adopted its course of conduct with anticompetitive intent "and if the policy exerted an effect substantially similar to that of a conspiracy among independent companies in restraint of trade."¹²³ In effect, the court would thus require that an enterprise's internal decision be tainted with anticompetitive intent *and* have substantial "external impact" before labeling the decision an intra-enterprise conspiracy.

D. *The "One-Man Show" Exception*

This possible exception is of much more limited practical application than the foregoing exception for noncompeting affiliates, but is of crucial importance to sole entrepreneurs who choose to do business through a corporate structure. In brief, the "one-man show" exception provides that no § 1 conspiracy can be possible where incorporated affiliates share the same sole shareholder, and this individual serves as the exclusive decision-maker on behalf of his affiliated corporations.¹²⁴ The exception is premised on the obvious truth that one individual, although functioning through multiple corporate entities, is incapable of conspiring with himself. In this world of "form turned substance and substance turned form"¹²⁵ the application of the intra-enterprise conspiracy doctrine to a single-person operation appears especially ridiculous. Because of this narrow premise, the exception obviously does not extend to situations where the sole shareholder is a holding company with multiple stockholders rather than an individual. In such cases, there will almost certainly be multiple individual participants in the decision-making process. There are those, however, who advocate a uniform rule to apply both to the case of a sole individual shareholder and to a sole incorporated shareholder.¹²⁶

Several cases have been decided on this exception. An early decision was *Windsor Theatre Co. v. Walbrook Amusement Co.*,¹²⁷ where a private action was dismissed for lack of evidence that the activities of the two defendant corporations had been directed by

123. *Id.*

124. Annot., 20 A.L.R. FED. 682, 695-96 (1974); Barndt, *supra* note 12, at 188.

125. Krause, *supra* note 6, at 929.

126. *E.g.*, Annot., 20 A.L.R. FED. 682, 696 (1974).

127. 94 F. Supp. 388 (D. Md. 1950) *aff'd*, 189 F.2d 797 (4th Cir. 1951).

any one other than Thomas Goldberg, the president and chief executive of both corporations.¹²⁸ Although Goldberg's wife owned the corporations jointly with her husband, there was no evidence that she participated in decision-making, nor that other officers or agents of the corporation participated.¹²⁹ Apparently contrary decisions were distinguished by the court since "in each case the corporations had two or more agents or officers."¹³⁰

The same result as that in *Windsor Theatre* was reached in *Rayco Manufacturing Co. v. Dunn*,¹³¹ in which summary judgment was granted on behalf of numerous subsidiary corporations, owned by one individual, Joseph Weiss, who also served as their president. The court noted:

The conspiracy complained of here is not the type at which the statute is directed. There is no joinder of parties to control the market or institute unlawful acts, which could not have been done by a single corporation acting alone. From the evidence before the court, it would appear that the subsidiary corporations and Weiss were one and the same person.¹³²

Apparently contrary results were reached in two cases: *Phi Delta Theta Fraternity v. J. A. Buchroeder & Co.*,¹³³ and *Koufakis v. Carvel*.¹³⁴ However, these cases can be distinguished, on the ground that although there was a sole individual shareholder, there is no indication in the opinions that this individual was the only agent acting on the corporations' behalf.

The "one-man show" exception appears to be a thoroughly logical and sensible departure from the intra-enterprise conspiracy doctrine. In most cases there is no good reason for treating such small

128. 94 F. Supp. at 396.

129. *Id.*

130. *Id.*

131. 234 F. Supp. 593 (N.D. Ill. 1964).

132. *Id.* at 598.

133. 251 F. Supp. 968 (W.D. Mo. 1966). The court found alleged conspiracy of jewelry manufacturers and vendors to control the fraternity and sorority insignia goods business a proper defense to infringement action. It rejected the argument advanced by the jewelry companies that they were unable to conspire because they were wholly owned by a single individual.

134. 1968 Trade Cas. ¶ 72,343 at 84,933 (E.D.N.Y.). The court here denied a motion to dismiss on behalf of the individual defendant and his nine wholly-owned corporations, who were alleged to have conspired to deprive plaintiff of his Carvel franchise. In rejecting the argument of inability to conspire, the court merely noted that such an argument on motions was prematurely presented.

operations like larger enterprises. The result is in harmony with decisions like *Goldlawr, Inc. v. Shubert*,¹³⁵ holding a sole shareholder and agent incapable of conspiring with his corporation. The only difference between the *Goldlawr* situation and those discussed above is the purely formal aspect of more than one *incorporated* entity. In either situation there is only one actual party in a decision-making capacity.

IV. CONCLUSION

Until the Supreme Court offers an authoritative indication of the proper scope of the intra-enterprise conspiracy doctrine, each § 1 case involving a charge of conspiracy between affiliates will continue to present a challenge for defense counsel, who will have to muster decisional law and sound policy arguments to avoid broad application of the rule. Likewise, plaintiffs' counsel and prosecutors may have a challenge in overcoming judicial resistance to the more extensive applications of the doctrine.

Since it is recognized that some limits must be placed on intra-enterprise conspiracy the following are recommended: (1) the doctrine should never apply to multi-corporate operations owned and operated by a single individual; (2) the principle of *per se* liability should not be applied; and (3) the doctrine should not be invoked against noncompeting affiliates unless selection of the subsidiary form of doing business was motivated by the specific intent to restrain trade.

The foregoing review has been offered in the hope that it may be of help to the practitioner confronted with the strange conflicts of logic and policy that abound in the environs of the "weird doctrine" of intra-enterprise conspiracy.¹³⁶

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135. 276 F.2d 614 (3d Cir. 1960).

136. Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 452 (1973).

